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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JOANNE IMPERIAL, Plaintiff and Respondent, v. FIBROGEN, INC., et al., Defendants and Appellants.	A153535 (City & County of San Francisco Super. Ct. No. CGC-17-560698)

Defendants FibroGen, Inc. and Elias Kouchakji, a former vice-president at FibroGen, (collectively FibroGen) appeal from an order denying their motion to compel arbitration of a discrimination, harassment, and retaliation lawsuit filed by plaintiff Joanne Imperial, a former employee at the company. We find no error in the trial court's conclusion that the complete lack of mutuality in the arbitration provision of the employment contract rendered the provision unconscionable and unenforceable. Accordingly, we shall affirm the denial of the petition to compel arbitration.

Background

On April 22, 2014, Imperial received an offer of employment from FibroGen. The offer letter included the following arbitration provision: "Any dispute or claim, including all contract, tort, discrimination and other statutory claims, arising under or relating to your employment or termination of your employment with the company but excepting claims under applicable workers' compensation law and unemployment insurance claims ('arbitrable claims') alleged against the company and/or its agents shall be resolved by arbitration. However, you and the company agree that this arbitration provision shall not

apply to any disputes or claims relating to or arising out of the misuse or misappropriation of the company's trade secrets. Such arbitration shall be final and binding on the parties and shall be the exclusive remedy for arbitrable claims. You and the company hereby waive any rights each may have to a jury trial in regard to the arbitrable claims. Arbitration shall be conducted by the American Arbitration Association in San Francisco (or other mutually agreed upon city) under the national rules for the resolution of employment disputes. In any arbitration, the burden of proof shall be allocated as provided by applicable law. The company agrees to pay the fees and costs of the arbitrator. However, the arbitrator shall have the same authority as a court to award equitable relief, damages, costs, and fees (excluding the costs and fees for the arbitrator) as provided by law for the particular claims asserted." On April 28, 2014, Imperial accepted the offer of employment by signing and returning the offer letter.

On August 14, 2017, Imperial filed a complaint alleging causes of action for (1) discrimination on the basis of sex, gender, age and physical disability in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.); (2) harassment on the basis of sex, gender, age and physical disability in violation of FEHA; (3) retaliation in violation of FEHA; (4) failure to prevent discrimination, harassment and retaliation in violation of FEHA; (5) denial/ interference with California Family Rights Act (Gov. Code, § 12945.2); and (6) wrongful termination in violation of public policy.

FibroGen moved to compel arbitration and stay Imperial's lawsuit based on the April offer letter and the incorporated American Arbitration Association (AAA) rules. Imperial opposed the petition on the ground, among others, that the arbitration agreement was unconscionable. Following two hearings and significant briefing, the court denied the petition to compel arbitration. As relevant here, the court concluded that the court was entitled to make the decision as to arbitrability and that the arbitration provision in the offer letter was unconscionable and thus unenforceable.

FibroGen timely filed a notice of appeal.

Discussion

1. *The trial court had authority to determine that the arbitration agreement was not enforceable.*

FibroGen contends the trial court erred in finding that the arbitration agreement was unenforceable because the arbitration provision delegated enforcement of the agreement to the arbitrator. We disagree.

Questions regarding whether an arbitration agreement is enforceable are to be decided by the court "unless the parties clearly and unmistakably delegate them to the arbitrator." (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1439; *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) __ U.S. __ [2019 WL 122164] ["This court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence."]; *AT&T Technologies, Inc. v. Communications Workers of America* (1986) 475 U.S. 643, 649; *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943-945.) In *First Options of Chicago,* the court explained: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so. [Citations.] In this manner the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'—for in respect to this latter question the law reverses the presumption. [Citations.] [¶] But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, [citation], one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. [Citation.] On the other hand, the former question—the 'who (primarily) should decide arbitrability' question—is rather arcane. A party often might not focus upon that question or upon the significance of having

arbitrators decide the scope of their own powers. [Citation.] [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." (514 U.S. at pp. 944-945.) "The 'clear and unmistakable' test reflects a 'heightened standard' of proof." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 782 (*Ajamian*).)

Courts have consistently held that an express provision directing the arbitrator to determine the enforceability of the arbitration provisions constitutes "clear and unmistakable evidence" of an intent to delegate. (See, e.g., *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 79-80 [contract contained "express agreement" to have the arbitrator decide arbitrability]; *Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 892 [explicit language in arbitration agreement was evidence the parties intended to "arbitrate arbitrability"]; *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1560 [delegation clause providing " '[t]he arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement' " was clear and unmistakable].) The arbitration agreement in this case, however, contains no such express language.

FibroGen contends that by expressly incorporating the AAA rules into the agreement, the parties clearly and unmistakably agreed that the arbitrator would decide questions of arbitrability and conscionability. As relevant here, the AAA's "National Rules for the Resolution of Employment Claims" provide: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

In *Ajamian, supra*, 203 Cal.App.4th at page 789, the court questioned whether incorporation of the AAA rules alone was sufficient to demonstrate a clear and unmistakable intent to delegate the enforceability determination to the arbitrator. The court explained that "while the incorporation of AAA rules into an agreement might be

sufficient indication of the parties' intent in other contexts, we seriously question how it provides *clear* and *unmistakable* evidence that an employer and an employee intended to submit the issue of the unconscionability of the arbitration provision to the arbitrator, as opposed to the court. There are many reasons for stating that the arbitration will proceed by particular rules, and doing so does not indicate that the parties' motivation was to announce who would decide threshold issues of enforceability." (*Id*. at p. 790.) The court continued, "reference to AAA rules does not give an employee, confronted with an agreement she is asked to sign in order to obtain or keep employment, much of a clue that she is giving up her usual right to have the court decide whether the arbitration provision is enforceable. Assuming that an employee reads the arbitration provision in the proposed agreement, notes that disputes will be resolved by arbitration according to AAA rules, and even has the wherewithal and diligence to track down those rules, examine them, and focus on the particular rule to which appellants now point, the rule merely states that the arbitrator shall have 'the power' to determine issues of its own jurisdiction, including the existence, scope and validity of the arbitration agreement. This tells the reader almost nothing, since a court also has power to decide such issues, and nothing in the AAA rules states that the AAA arbitrator, as opposed to the court, shall determine those threshold issues, or has *exclusive* authority to do so, particularly if litigation has already been commenced." (*Id*. at p. 790.) Like the trial court, we find the reasoning in *Ajamian* persuasive.

FibroGen's reliance on *Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125 is misplaced. In *Brennan*, the Ninth Circuit held that an employment agreement's express incorporation of the AAA rules, as part of the arbitration provision, was clear and unmistakable evidence of the parties' intent to submit the arbitrability dispute to arbitration. In that case, it was undisputed that the employee "was a sophisticated party, an experienced attorney and businessman (a partner at Jones Day from 1984 to 2001, and Senior Vice President, General Counsel, and Deputy Chief Legal Officer of Washington Mutual from 2001 to 2008), who executed an executive-level employment contract with Opus Bank, a sophisticated, regional financial institution." (*Id*. at p. 1131.) The court

noted that while its holding "should not be interpreted to require that the contracting parties be sophisticated or that the contract be 'commercial' before a court may conclude that incorporation of the AAA rules constitutes 'clear and unmistakable' evidence of the parties intent" (*id.* at p. 1130), it nonetheless limited its holding "to the facts of the present case, which do involve an arbitration agreement 'between sophisticated parties' " (*id*. at p. 1131).

Imperial, while highly compensated, is a physician not a lawyer. Nothing in the record rebuts the statement in her declaration that she was only "generally familiar" with the concept of arbitration, was not familiar with the American Arbitration Association or its rules for arbitration and did not agree to delegate to an arbitrator the responsibility for deciding whether the arbitration agreement was illegal. Under these circumstances, for the reasons stated in *Ajamian*, we cannot presume that when signing the agreement Imperial intended to delegate to the arbitrator the *exclusive* right to determine enforceability of the arbitration provision.[1]

2. *The agreement is unconscionable*.

"An arbitration agreement is unenforceable if it is unconscionable at the time that it was made. [Citations.] The agreement is invalid if it is both procedurally and substantively unconscionable. [Citation.] Procedural unconscionability focuses on oppression and surprise due to unequal bargaining power, and substantive unconscionability turns on overly harsh or one-sided results. [Citations.] '[T]he more substantively oppressive the contract term, the less evidence of procedural

[1] *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547 cited by FibroGen is also distinguishable. That case involved a complex business acquisition contract between sophisticated actors with "comprehensive dispute resolution provisions . . . spanning four pages of single-spaced text" that "used broad language to express their agreement to avoid litigation as a means of dispute resolution." (*Id.* at p. 550.) What the parties intended in that case when they incorporated the AAA rules is of little assistance in determining whether Imperial clearly and unmistakably intended to delegate issues of enforceability to the arbitrator in this case. Nor are we persuaded by the limited discussion in *Rodriguez v. American Technologies, Inc*. (2006) 136 Cal.App.4th 1110, 1123.

unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' " (*Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 402.) The party opposing arbitration "has the burden to demonstrate that the arbitration provisions are procedurally and substantively unconscionable." (*Ibid*.)

A. Procedural unconscionability

In *Baltazar v. Forever 21, Inc*. (2016) 62 Cal.4th 1237, 1244 (*Baltazar)*, the court stated, " '[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. . . . Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum. [Citation.] Ordinary contracts of adhesion, although they are indispensable facts of modern life that are generally enforced [citation] contain a degree of procedural unconscionability even without any notable surprises, and "bear within them the clear danger of oppression and overreaching." [Citation.]' [Citation.] . . . [C]ourts must be 'particularly attuned' to this danger in the employment setting, where 'economic pressure exerted by employers on all but the most sought-after employees may be particularly acute.' " Relying on *Baltazar*, the trial court concluded that the " 'take it or leave it' arbitration agreement in [the] employment contract" had a "low degree" of procedural unconscionability.

FibroGen disputes that the employment agreement was an adhesion contract. It argues, "While the offer letter states that Dr. Imperial had three business days to review and accept it, it is undisputed that she actually took additional time – indeed as much time as she wanted – before signing the offer letter and arbitration agreement a full six days after it was issued on April 22, 2014. Thus, Dr. Imperial took *twic*e the amount of time typically provided to potential new employees." In fact, the letter states, "this offer of employment is effective for [three] business days from the date of this letter. There are two originals of this letter enclosed. If all the forgoing is satisfactory, please sign and date each original and return one to me within five business days in the enclosed envelope." The offer letter was dated Tuesday, April 22, and was therefore effective through Friday,

April 25. Imperial signed the letter on Monday, April 28, at most one business day late. Imperial explained in her declaration that she was out of town when the letter arrived and at the time she informed FibroGen that she would be returning the letter the following week when she returned home. In any event, the fact that Imperial perhaps took an extra day to consider the offer before accepting the position does not establish that she was in a position to negotiate the terms of the arbitration agreement. Nothing in the record suggests that she negotiated any other terms of her employment. To the contrary, Imperial states in her declaration that she was informed that FibroGen was making its "best offer," which she understood to mean that the offer was non-negotiable. She accepted the offer despite a substantial reduction in her salary. As the trial court found, the evidence submitted established that Imperial, "due to her need to obtain a new job, had an inferior bargaining position to FibroGen."[2]

Accordingly, because the agreement is an adhesion contract, there exists an inherent, low level of procedural unconscionability. There is no evidence that Imperial was deceived, placed under duress, or otherwise manipulated into signing the employment agreement containing the arbitration provision. Thus, while "[t]he adhesive nature of the employment contract requires us to be 'particularly attuned' to [a] claim of unconscionability [citation], . . .we do not subject the contract to the same degree of scrutiny as '[c]ontracts of adhesion that involve surprise or other sharp practices.' " (*Baltazar, supra*, 62 Cal.4th at p. 1245.)

B. Substantive unconscionability

The trial court found that the agreement is substantively unconscionable because it lacks "any mutuality with regard[] to what is required to be arbitrated." The court explained, "The only claims that are required to be arbitrated are those brought by Dr. Imperial 'alleged against the Company [FibroGen] and its/or its agents.' The sentence in which the quoted phrase is found unmistakably states that only 'arbitrable claims'

[2] According to Imperial's declaration, she had not received other employment offers despite looking for eight months and going on numerous interviews.

alleged [against] FibroGen and its agents are subject to arbitration." FibroGen suggests that the court misread the agreement. We disagree.

The agreement reads: "Any dispute or claim, including all contract, tort, discrimination and other statutory claims, arising under or relating to your employment or termination of your employment with the Company but excepting claims under applicable workers' compensation law and unemployment insurance claims ("arbitrable claims") alleged against the Company and/or its agents shall be resolved by arbitration." Contrary to FibroGen's argument, we do not read the phrase "alleged against the Company and/or its agents" as modifying only "claims under applicable workers' compensation law and unemployment insurance claims." The plain reading of the agreement is that all claims relating to Imperial's employment or termination, except those involving workers' compensation or unemployment insurance, that are alleged against FibroGen are subject to arbitration. In contrast, FibroGen has no obligation to submit to arbitration any of its claims against Imperial relating to her employment or otherwise.

In *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 117, the court held that the law requires a " 'modicum of bilaterality' in an arbitration agreement." The court explained, "Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.' As has been recognized[,] ' "unconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it." ' [Citation.] If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose." (*Id*. at pp. 117-118; *Nyulassy v. Lockheed Martin Corp*. (2004) 120 Cal.App.4th 1267, 1281

[“ ‘[T]he paramount consideration in assessing substantive conscionability is mutuality.’ ”].) FibroGen has offered no justification for its one-sided agreement.

Finally, contrary to FibroGen’s argument, the trial court did not abuse its discretion in refusing the strike the clause providing that only arbitrable claims “alleged against the company and/or its agents” are subject to arbitration. (*Armendariz v. Found. Health Psychcare Services, Inc., supra*, 24 Cal.4th at p. 122 [trial court has “some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement”].) “Two reasons for severing or restricting illegal terms rather than voiding the entire contract appear implicit in case law. The first is to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement—particularly when there has been full or partial performance of the contract. [Citations.] Second, more generally, the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme. [Citations.] The overarching inquiry is whether ‘ “the interests of justice . . . would be furthered” ’ by severance.” (*Id*. at pp. 123-124.) As Imperial argues, striking the offending requirement would not necessarily serve either of the above purposes. Accordingly, the trial court did not err in denying the motion to compel.

Disposition

The order denying appellants’ petition to compel arbitration is affirmed. Imperial shall recover her costs on appeal.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
BROWN, J.